BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The opinion of the District Court, shown at pages 59-61 of the record, is reported at 36 Federal Supplement 809.

The opinion of the Eighth Circuit Court of Appeals is not yet reported. It was dated March 12th, 1942, and is shown at pages 99-109 of the record.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the foregoing petition. It is hereby adopted and made a part hereof.

III.

STATEMENT OF THE CASE.

A statement of the case and the questions presented is contained in the foregoing petition.

It is hereby adopted and made a part hereof.

IV.

SPECIFICATION OF ERRORS.

The Eighth Circuit Court of Appeals erred:

I.

In attempting to analyze the reasoning behind the decisions of the Missouri courts that the expiration date of policies of term insurance is not governed by the time

of payment of the first premium in such a manner as to reach the result in this case that the expiration of the term policy *is* governed by the time of payment of the first premium, despite the fact that all the controlling Missouri decisions are to the contrary—specifically exempting term insurance from the operation of any such rule—as previously recognized and announced by the Eighth Circuit in *Penn Mutual* v. *Forcier,* 103 F. 2d 166.

II.

In holding that the fact of a change in age between the policy date and its effective date which would cause a discrimination in rates in favor of the insured, if the latter determined the term of the policy, was immaterial unless an express agreement that the policy be dated before the age change is shown.

III.

In holding that there was no agreement to the policy dates or acceptance thereof as a matter of law, despite the fact that the policy was retained by the insured without objection and all premiums paid in accordance therewith throughout the five year life of the contract.

IV.

In holding that judgment for plaintiff rendered on motions for judgment on the pleadings was proper, although an allegation of fact essential to plaintiff's case was disputed, and the pleadings contained documentary evidence refuting such allegation.

V.

SUMMARY OF THE ARGUMENT.

POINT A.

The Circuit Court of Appeals in placing its own evaluation on the reasons given by the Missouri courts for

holding that the expiration date of term insurance cannot be governed by the time of payment of the first premium, to arrive at a result contrary to their holdings, is evading the mandate of this Court in the Erie case.

POINT B.

The Circuit Court of Appeals holding that a change of age of the insured between the policy date and the effective date of the policy, which would discriminate in favor of the insured in the matter of rates in violation of the Missouri anti-discrimination statute, if the later date were to govern, was not material on the basis of a Missouri decision in which the change of age did *not* discriminate in favor of the insured, conflicts with the applicable Missouri decisions to the contrary.

POINT C.

The decision of the Circuit Court of Appeals that the insured had not accepted the policy dates or agreed thereto as a matter of law, despite the fact that it was retained without objection and premiums paid thereon throughout its duration, is in conflict with the Missouri decisions.

POINT D.

The Circuit Court of Appeals' approval of the trial court's entering final judgment for the plaintiff on cross motions for judgment on the pleadings, when an essential fact to a recovery for plaintiff was disputed and the pleadings contained documentary evidence refuting the allegation of such fact, is an erroneous departure from the accepted and usual course of judicial proceedings.

ARGUMENT.

POINT A.

The opinion recognizes that the Missouri courts hold that the rule of the Halsey case (to-wit, that a full year's premium entitles the policyholder to a full year's insurance beginning with the effective date of the policy) does not apply to term insurance, but it undertakes to go behind such holdings to reach the conclusion that the fundamental basis of the decisions does not lie in the character of the particular type of insurance as such, but rather in other factors which it deems controlling. Having thus "rationalized" those decisions, and considering that such other factors were not sufficiently established in this case, it applied the rule of the Halsey case to the policy of term insurance in suit, in direct collision with the rulings of the Missouri courts.

Petitioner contends that such procedure is not within the province of the Federal courts under the mandate of the Erie case, and that to permit the Federal Court to reach the result it desires under the guise of interpretation or construction of State Court decisions clearly undermines the whole purpose of the Erie decision. When, as in this case, such process produces a result directly contrary to the uniform rulings of the state court on the point, there can be no question that it renders ineffectual the object intended to be attained by the Erie decision.

The most favorable view that can be accorded the method employed in the Circuit Court of Appeal's opinion herein, is that it expressed the belief that if this case had been before the Missouri Supreme Court, it would likewise have recognized that other factors present in the previous cases in which it had considered the application of the rule of the Halsey case to term insurance were

fundamentally more important than the fact that the contract provided for expiration at the end of a stated term, and would have announced a different view of the subject in accord with the ideas of the Eighth Circuit.

The opinion admits that the Missouri Supreme Court in *National City Bank* v. *Missouri State Life Ins. Co.*, 332 Mo. 182, 57 S. W. 2d 1066, pointed out that in the Halsey case the suit was upon policies "payable in the event of death whenever it occurred" whereas the action before it was "upon a term policy of insurance * * * provided * * * death shall occur within the term of five years from March 19, 1923," but says that "The real basis of the court's decision was the fact that the policy had been unconditionally delivered to the insured, and so became effective whether the premium was paid or not" (R. 103-104).

The opinion does not set out the following further portion of the opinion in the National City Bank case, l. c. 1069:

> "The guiding thought of the opinion in the Halsey Case seems to have been one year's protection for one year's premium during the span of life of the insured. But if Riley had lived out the term of this policy and had paid premiums for semiannual periods beginning May 23 and November 23 of each year, as respondent claims was his right, he would have made his last payment for less than six months' protection; that is, from November 23, 1927, to March 19, 1928. And if, as would seem more logical, he had calculated his premium year from January 2, 1924, the date of his actual payment of the first premium, he would have paid only nine semiannual premiums, of which the last would have been for a shortened period of insurance. Therefore by his own delay he would not have enjoyed the benefit of six months' protection for each semiannual premium payment.
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> * * * * * * *
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> "If respondent is sound in its argument that Riley was entitled to six months' protection for six months'

> premium paid, and that the premium period was not fixed by the specifications in the policy, it should follow that, if Riley had lived, he should have insurance for five years from the date of the payment of the first premium despite the fact that by the terms of the policy the obligation of the insurer to pay the amount of insurance named upon the death of Riley was, 'provided such death shall occur within the term of five years from March 19, 1923.' **The conclusion is untenable and the premise is a fallacy."**

Assuming that the decision could have been reached on the ground which the Court of Appeals says was its real basis, the fact that the court nevertheless stated this added reason emphasizes the importance and weight which the Missouri Supreme Court accords it.

It indicates that the Missouri Court's opinion on the subject is strong and deeply imbedded. It certainly does not indicate the likelihood that that Court would now say that respondent's conclusion is sound, rather than "untenable," the premise a verity instead of "a fallacy."

That is the last opinion of the Missouri Supreme Court involving the application of the Halsey rule to term insurance.

The Missouri intermediate appellate courts have had term insurance cases before them since the National City Bank decision, but these decisions were likewise disregarded in the Court of Appeals' opinion.

In *Peterson* v. *Metropolitan Life Insurance Company*, 84 S. W. 2d 157, the St. Louis Court of Appeals said, l. c. 159-160:

> "It must be borne in mind that this policy was in no sense the more usual type of policy providing for continuing insurance upon the payment of annual, semi-annual, or quarterly premiums on or before certain days occurring periodically after the date of the policy, but instead it provided for term insurance which would automatically expire at the end of the stated term, but which might be renewed for suc-

cessive like terms upon the payment of the single premium fixed for each such successive renewal.

"In other words, plaintiff did not buy a straight policy which would warrant the construction that the time for the further payment of premiums thereon would be determined by the effective date of the policy, which in this case was April 15, 1932, the date of the delivery of the policy to him in person, but rather he contracted for term insurance, with the duration of the term definitely, clearly and explicitly fixed by the provisions of the contract itself, and this irrespective of when the contract might become effective."

In *Lacy* v. *American Central Life Insurance Company*, 115 S. W. 2d 193, the Kansas City Court of Appeals said, l. c. 199, 200:

"There is abundant authority to the effect that (*except in cases where the policy is one for term insurance*) the anniversary date of the policy for the payment of premiums thereon dates from the date when the policy goes into effect and not from the date of the approval of the application, where the contract is not complete upon its approval and issuance but something remains to be done to complete it—such as delivery. *Halsey* v. *American Central Life Ins. Co.*, 258 Mo. 659, 167 S. W. 951. * * *

"The Prange Case is authority for the proposition that, where the contract is, in plain and unambiguous language, one for *term insurance* or for insurance ceasing at a certain time, it *must be given effect as such* and that *the courts are powerless to give it any other effect;* * * *" (Emphasis supplied).

The Eighth Circuit itself had previously recognized the unequivocal exclusion of term insurance from the rule of the Halsey case in *Penn Mutual* v. *Forcier*, 103 F. 2d 166 (opinion by Judge Thomas, not sitting in this case), a case not involving term insurance but in which the court reviewed the Missouri law on the Halsey case theory, l. c. 167-8:

> "In construing such policies and in determining their effective premium date the Missouri courts have emphasized two *controlling* factors: first, the character of the contract, that is whether it provides for ordinary life, term or endowment insurance; and, second, the relative date of the insured's change of age for the purpose of determining the amount of the premium.
>
> "The application of these distinctions has resulted in two separate and distinct lines of decision by the Missouri courts. * * *" (Emphasis added).

It is a complete non-sequitur for the court to attach any significance to the failure of the Missouri Supreme court in a later decision (*Howard* v. *Aetna Life Ins. Co.*, 346 Mo. 1062, 145 S. W. 2d 113) "to make any legalistic differentiation between the two kinds of policies (ordinary and term), as such" (R. 104-5), when term insurance was not involved nor anywhere mentioned in that opinion. The Missouri court there was considering only the factors which were present and the contentions based thereon, a claimed change of age, recognition of the policy date by payment of premiums, etc.

There is no word or intimation in that opinion that if the policy had been one of term insurance, such fact would not have affected the result.

It is highly illogical, in the absence of any expression upon the subject at all, to ascribe to it an indication of a complete change in the court's views announced in its previous uniform rulings on the point.

There can be no doubt that the differentiation in the type of insurance to which the Halsey rule will apply is an important question of local law, and since it is inescapable that the opinion is in conflict with the holdings of the applicable local decisions that the Halsey rule cannot be applied to term insurance, petitioner submits that it should not be permitted to stand.

POINT B.

The decision is also in conflict with the applicable Missouri decisions on the change of age factor. The opinion purports to answer petitioner's pleaded defense that it would not under its own rules have issued the policy applied for at the requested rate of premium with a term beginning subsequent to April 8th, 1935, and could not have done so because in violation of the Missouri anti-discrimination statute, with a quotation from *Howard* v. *Aetna Life Ins. Co., supra.* In so doing, it failed to take into account the fact distinction in that case which nullified any discrimination, although the Missouri court had recognized it and differentiated the case from those in which an actual change of age for insurance purposes had occurred between the policy date and the claimed effective date, so that a higher premium would have been applicable if the latter date were to govern. Such cases have always been exempted from the rule of the Halsey case because its enforcement would effectuate a violation of the anti-discrimination statute. The force of the statute to preclude the rule of the Halsey case where an age change is involved was first announced in *Prange* v. *International Life Ins. Co.*, 329 Mo. 651, 46 S. W. 2d 523. It has continued to have that effect, for, as stated in *Tabler* v. *General American Life Ins. Co.*, 117 S. W. 2d 278, l. c. 283:

> "In fact, the rule of the Halsey Case could not be applied to the situation herein involved, where there had been in the intervening period a change of age for purposes of computation of premiums, because the premium provided by the policy would not pay for $10,000 insurance for a full year from May 26, 1926, when Tabler's premium was required to be computed at the rate for age 28. We hold that, upon the principles established by the Prange and National City Bank Cases, we must construe this contract to fix the annual date for premium payments at March 2d as stated in the policy, and that there is no reasonable basis for any later date."

In the Howard case, the Supreme Court said that the answer to that was that the insured had not contracted with respondent as to the rate or to date the policy prior to July 1st, and the provision in the policy with reference to misstatement of age took care of any discrimination. That was so because of the coincidence of a misstatement of age, an *over*statement of one year, whereby the premium purchased the correct amount of insurance for the time at which the first premium was paid and the policy became effective, as pointed out in the Howard opinion.

Obviously, the anti-discrimination statute is not applicable if there is no discrimination.

There is some language in the opinion which, if the fact of the overstatement of age was not present, would seem to indicate that a change of age was immaterial unless there was an express agreement that the policy be dated back for the purpose of securing the benefit of a lower age rate. However, that language has to be interpreted in the light of the facts. If an insured was intentionally to be charged a higher premium than other insurants with equal expectations of life, an express contract would of course have to be shown. If the higher charge resulted from a mistake as to age, the policy provision would take care of it. In the reverse situation, as here, where there is no misstatement of age and the policy provision for adjustment does not apply, but there is a change of age before the premium is paid, which will result in a discrimination in favor of the insured in the matter of rates if the policy term does not begin until the premium is paid, the statute flatly prevents such a result. The court obviously could not have intended to write a senseless and nullifying condition into the statute that it should prohibit discrimination only when the parties had expressly agreed that the term of the policy should begin *before* the age change so that the lower premium would be applicable. In such cases there would be no dis-

crimination, anyway, whereas if the parties intended to grant a lower age rate to the insured *after* the age change when a higher rate applied, then the statute would not prevent it, according to the Court of Appeals' application of the opinion. In addition to the fact that it must be presumed the court did not intend to nullify the statute, it is conclusively shown that it had no such intention and was not attempting to change the existing law in any way by the fact that it did not overrule or modify its previous decisions in the Prange and Tabler cases, but on the contrary differentiated them because of the coincidence of overstatement of age which made the premium charged the correct one for the later effective date. After pointing out that circumstance, the opinion says:

> "It is evident that the case before us is materially different than the Tabler and Prange cases." 346 Mo. l. c. 1067.

In the syllabus to the opinion appearing in the official reports of the Missouri Supreme Court, the Court says:

> "Syllabus 4—* * * a cause of action was stated notwithstanding there was *a change of age* between the date of the policy and the payment of the first premium *which did* **not** *discriminate* in favor of the insured in the matter of rates (Sec. 5729, R. S., 1929)."

Consequently, the holding of the Circuit Court of Appeals that the Howard decision eliminates the statutory defense in a case where a change of age *does* discriminate in favor of the insured is clearly erroneous and necessarily conflicts with the *applicable* local decisions.

The policy provision for adjustment of the amount of insurance in case of misstatement of age does not affect it. There was no misstatement of age here as in the Howard case. The policy here was properly issued as applied for, at the correct age, premium, term and amount requested. The amount could not have been disputed.

Plaintiff sued for the full amount without offering any adjustment. The court did not order any adjustment. The adjustment provision cannot be given effect to continue the term of the policy without also being given effect to cut down its amount. Obviously, plaintiff cannot use it in theory as an argument that it prevents discrimination and thus avoids the effect of the statute, while denying it in practice by claiming and securing judgment for the full amount.

The opinion of the Court of Appeals in upholding such a result unavoidably conflicts with the local statute and decisions concerning it.

POINT C.

The additional defense that the insured had accepted and agreed to the policy dates by his own conduct in retaining the policy without objection and paying the premiums monthly as they fell due in accordance with its terms throughout the entire five year duration of the contract is disposed of in the opinion by the bare statement that "*Mere* retention of the policy alone is not sufficient to establish such an agreement or acceptance as a matter of law" (R. 101). The opinion thus fails to recognize a controlling defense under the Missouri law.

Petitioner concedes that an applicant for insurance should and does have a reasonable time within which to inspect the policy issued before becoming bound by its terms.

Petitioner contends, however, that the Missouri law does not permit five years to be classed as a reasonable time.

Under the Missouri decisions, a lapse of four days after receipt of the policy has been held not sufficient to require an election, whereas retention of a policy without objection for periods of two months, four months, five months and six months has been held in the respective cases to bind the policyholder to its terms.

These cases are cited in *Steward* v. *Mutual Life of Baltimore*, (Mo. App.) 127 S. W. 2d 22, wherein it is also pointed out that the reasonableness of the time may become a question of law, l. c. 23-24:

> "Under the evidence here, plaintiff was required to inform defendant of his dissatisfaction with the terms of the policy within a reasonable time after its delivery or be bound thereby. The policy was in his possession and its language is clear. He had but to read in order to know that the disability provision was a limited one. *Swinney* v. *Modern Woodmen of America*, (Kansas City Court of Appeals) 231 Mo. App. 83, 95 S. W. 2d 655, l. c. 658. The facts here are unlike those in many of the cases cited by respondent.
>
> It was the duty of plaintiff, when he received the policy, to promptly examine same; and if it did not contain the provisions agreed upon it was his duty to promptly notify defendant of that fact, and to refuse to retain the policy. * * * This court, speaking through Bland, J., held in *Winegardner* v. *Service Life Insurance Company*, 59 S. W. 2d 712, that: 'It was too late, after the risk had been carried for five or six months and the premium for that period had been earned, for him to make an objection to the variance between the representations made and the terms of the policy.' The time within which one must reject a policy of insurance or be bound by its terms may be a question of law. *Lierheimer* v. *Life Insurance Company*, 122 Mo. App. 374, l. c. 382, 99 S. W. 525."

The latest expression of this rule by the Missouri Supreme Court is found in the opinion in *Bramble, Admx.*, v. *K. C. Life Insurance Company*, ... S. W. 2d ..... (not yet published), wherein it was said:

> "The answer to this argument is that this suit by plaintiff, beneficiary, is based upon the policy as issued, while all preliminary negotiations between the insured and defendant merged in the policy issued by defendant and accepted by the insured. This policy the insured retained without objection throughout the fifteen year period. This policy expressly pro-

vided that the first year was term insurance and fixed no cash surrender or loan value or paid-up or extended insurance until after the expiration of three years and all of the values set out in the policy were figured as beginning after the close of the one year period of term insurance. It is this policy that we must construe and we are bound by the terms of the policy. *Tabler* v. *General American Life Insurance Company,* 342 Mo. 726, 117 S. W. 2d 278, 282; *Prange* v. *International Life Insurance Company,* 329 Mo. 651, 46 S. W. 2d 523, 526; *Legrand* v. *Central States Life Insurance Company,* (Mo. App.) 132 S. W. 2d 1105, 1108 (5)."

Petitioner submits that the opinion of the Circuit Court of Appeals clearly conflicts with the applicable Missouri decisions in this respect.

POINT D.

The opinion sanctions the trial court's departure from the accepted and usual course of judicial proceedings in approving the rendition of a final judgment on motions for judgment on the pleadings although an essential allegation of fact was denied and the pleadings contained documentary evidence refuting the alleged fact.

Assuming that findings of fact may properly be made at all on motions for judgment on the pleadings, although not authorized by the Rules of Civil Procedure, the defendant in filing its motion cannot be held to have consented to the making of a finding contrary to the evidence pleaded.

Specifically, the primary fact essential to a judgment for plaintiff was non-payment of the premium until April 15th (that being the date of insured's death 5 years later) or thereafter. Plaintiff *alleged* payment on April 20th, but also pleaded the contract and attached it as an exhibit. The contract showed payment on April 7th (the application, which was attached to and made a part of the policy, contained the insured's statement that he had

paid the first premium on that date), and this was not alleged to be erroneous, explained or nullified by the plaintiff. Defendant itself set up a photostatic copy of the receipt in the possession of plaintiff given by the agent to the insured for such payment (R. 39). That receipt bore the date April *20*, 1935, but also showed that the figure "2" in the "20" had been written over another figure, and the defendant alleged that its date should correspond to the date of the application (April 7th) in accordance with the insured's statement therein that the receipt given him for such payment, which he accepted and agreed to, did bear a corresponding date (R. 41).

As to the date April 20th, defendant admitted only that on that date *plaintiff* (not the insured) issued her check for the *amount* of the first monthly premium (The application showed payment on April 7th by the insured of $15.*50* to cover the first premium. The receipt given to the insured was for $15.*50*. The check issued on April 20th by plaintiff was for $15.*30*, the exact amount of the first premium). This was in no way an admission that legal and binding payment for all purposes had not been made by the insured on April 7th as stated.

The record is silent as to *how* the payment on April 7th was made, because no additional evidence could be produced on the subject by either party. The most reasonable speculation is that a check for the estimated amount of the premium was given to the agent to cover the payment and hold the lower age premium rate; that when the exact amount of the premium was determined, a check in the correct amount was issued in exchange for the first. But it is completely immaterial whether the payment was effected by cash, check, note, post-dated check, or the simple extension of credit by the agent to the insured. The statement of payment on April 7th was subscribed by the agent and general agency, and that alone constituted payment as binding as if made in legal tender at the home office of the company.

In addition, the company acknowledged payment as of April 7th by issuing its contract making the application a part thereof showing payment on that date, conclusively binding itself for any loss occurring after such date regardless of the time of actual payment to it.

On that documentary evidence set forth in the pleadings, the trial court could have made a finding that the premium was paid on April 7th, for the documentary evidence conclusively showed it, and there was no contradiction in the fact that a check for the exact amount was issued on April 20th.

But the Court could not validly make a finding of fact that the premium was *not* paid until April 20th, in the face of the pleaded documentary evidence. Actually he did not do so, except by inference from his finding that the check issued on April 20th by plaintiff was in *payment* of the first premium (R. 85). However, it was treated as not paid until that time in his conclusions of law (R. 55, 57), and the judgment was based on that assumption of fact.

A finding which cannot be made directly because contrary to the pleaded facts on which the motions are based, cannot be assumed and justified as a proper inference from the pleadings. The Circuit Court of Appeals in so justifying it has sanctioned a departure from the accepted and usual course of judicial proceedings on which defendant relied in filing its motion for judgment on the pleadings. Whether there was any other evidence that could have been introduced at a trial or not, defendant cannot be held to have consented to a finding contrary to the evidence pleaded by filing a motion for judgment on the pleadings.

Petitioner accordingly contends that the decision is plainly improper in this respect.

CONCLUSION.

For the foregoing reasons, your petitioner, submits that the exercise of this Court's power of supervision is called for in this cause.

Respectfully,

WILLIAM C. MICHAELS,
RALPH M. JONES,
Kansas City, Missouri,
Attorneys for Petitioner.

MICHAELS, BLACKMAR, NEWKIRK, EAGER & SWANSON,
Kansas City, Missouri,

RASSIEUR & RASSIEUR,
St. Louis, Missouri,

ALEXANDER & GREEN,
New York City, New York,
Of Counsel.